

# The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After *Randall v. Sorrell*

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*This Article considers the Supreme Court's recent decision in Randall v. Sorrell striking down Vermont's campaign expenditure and contribution limits. The Supreme Court's campaign finance jurisprudence before Randall was marked by swings in doctrine and general incoherence. At first glance, the plurality opinion in Randall appears to add a level of coherence to campaign finance law by judging the constitutionality of such laws through an assessment of the relationship between campaign contribution limits and political competition. Alas, the appearance of coherence is illusory, and there is little reason to believe Randall marks a significant move by the Court to embrace the political markets approach.*

*As Part III explains, the Court in Randall has not embraced competition as the organizing principle for analyzing the constitutionality of all campaign finance laws or election laws. The focus on competition—which garnered the votes of only three Justices, and one of the three noncommittally—appears to be the outcome of a compromise between Justice Breyer, who wanted to preserve as much of existing doctrine as possible against a deregulationist trend, and the two newest Justices on the Court. Existing Supreme Court election law doctrine, including its recent partisan gerrymandering jurisprudence, also rejects the anticompetition principle as a means of deciding election law cases.*

*Part IV then turns from external coherence to the internal coherence of the competition test for low contribution limits, finding the test less predictable and coherent than its technocratic nature suggests. Following Randall, it appears that challenges to low contribution limits will turn—or at least appear to turn—upon fact-intensive political science expert testimony about the amount of money necessary to run a competitive race in the relevant jurisdiction. But such testimony often will be speculative when it comes to whether enough money may be raised to insure a competitive race. Court decisions could well turn upon a thin credibility determination to be made*

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by the court, a determination that may depend upon each judge's predisposition to favor or oppose the particular campaign finance regulation.

*Part V* advocates that courts engage in a careful and honest balancing that gives considerable deference to the value judgments made by states in enacting campaign finance laws, but then use close scrutiny to make sure the measure is carefully drawn to meet those goals. This kind of honest balancing was impossible in *Randall* because of the Court's ostensible rejection of the political equality rationale for campaign finance regulation. The real question the *Randall* Court should have asked is whether the Vermont law was closely drawn to promote political equality and, if so, whether the costs to individuals and groups who wanted to mobilize for political action were too great to allow the law to go forward despite its gains in promoting political equality.

## I. INTRODUCTION

Coherence has never been the Supreme Court's long suit in its campaign finance cases.<sup>1</sup> By the end of 2003, it appeared that things could not get any worse in this regard. The Court had just decided *McConnell v. Federal Election Commission*,<sup>2</sup> upholding most of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), commonly referred to as the "McCain-Feingold law" for its two Senate sponsors. The Court in *McConnell*, as part of four recent Supreme Court cases making up "the New Deference Quartet,"<sup>3</sup>

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<sup>1</sup> Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 121 (1980) (citing "administrability" as the one person, one vote doctrine's "long suit" and noting that the "more troublesome question is what else it has to recommend it"). In recent years, even the administrability of the one person, one vote rule has been undermined, as the Court appeared to allow, and then perhaps backed away from allowing, the rule to be used to police partisan gerrymandering. See *Larios v. Cox*, 542 U.S. 947 (2004) (Stevens, J., concurring) (suggesting such a use of the one person, one vote rule). But see *id.* at 951 (Scalia, J., dissenting) (rejecting such a suggestion); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?*, 153 U. PA. L. REV. 541 (2004); *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2612 (2006) (Kennedy, J., concurring) ("Even in addressing political motivation as a justification for an equal-population violation, moreover, *Larios* does not give clear guidance.").

<sup>2</sup> 540 U.S. 93 (2003).

<sup>3</sup> See Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 886 (2005). The other three cases are *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), *Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado II)*, 533 U.S. 431 (2001), and *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003).

seemed poised to embrace a political equality rationale for campaign financing. In particular, the Court seemed to tacitly endorse the “participatory self-government” objective for campaign finance reform proposed by Justice Breyer in a concurring opinion in one of the earlier New Deference cases.<sup>4</sup> It nonetheless “continued to entertain the fiction that it [was] adhering to the anticorruption rationale of *Buckley v. Valeo*, perhaps because one or two members of the five-Justice majority making the shift in *McConnell* may [have been] unwilling . . . to expressly embrace” the participatory self-government rationale.<sup>5</sup> The tension between what the Court was saying and what it was doing strained the credulity of the enterprise.

Justice O'Connor was one of the five members of the *McConnell* majority, a Justice whose position on some fundamental campaign finance questions shifted at least three times during her tenure on the Court.<sup>6</sup> Her departure from the Court and replacement with Justice Alito held out the promise of a more coherent approach to this area of the law.<sup>7</sup> Coherence may eventually emerge, but it did not do so in the Roberts Court's first major foray into the area in *Randall v. Sorrell*.<sup>8</sup> In *Randall*, the Court by a 6–3 vote struck down Vermont's campaign spending limits and low individual

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<sup>4</sup> *Shrink Missouri*, 528 U.S. at 400–04 (Breyer, J., concurring). Justice Breyer expanded on his ideas in STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 39–55 (2005).

<sup>5</sup> Richard L. Hasen, *Buckley Is Dead: Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 32 (2004).

<sup>6</sup> See *id.* at 32 n.7.

<sup>7</sup> Coherence could come in a number of ways, including through either a more explicit embrace of “participatory self-government” or through a shifting of campaign finance doctrine toward deregulation through a coalition among the remaining dissenters in *McConnell*, Justice Alito, and Chief Justice Roberts, who replaced *McConnell* dissenter Chief Justice Rehnquist. The latter course seemed (and still seems) more likely than the former, at least given the new composition of the Court. See Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 677 (2006) (“While it is impossible to know how Chief Justice Roberts and Justice Alito will vote in future campaign finance cases, further expansion of the New Deference seems the least likely possibility.”).

<sup>8</sup> 126 S. Ct. 2479 (2006). Earlier in the 2005 Term, without the participation of Justice Alito, the Justices unanimously reversed a three-judge court opinion rejecting an “as applied” challenge to BCRA. *Wis. Right to Life v. Fed. Election Comm’n*, 126 S. Ct. 1016 (2006). This ruling was not one on the merits of the “as applied” challenge, and the case is now back before the Supreme Court. See 127 S. Ct. 1145 (2007); Richard Briffault, *WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807, 817 (2007) (discussing *WRTL*).

campaign contribution limits as violations of the First Amendment. The controlling plurality opinion in the case is that of Justice Breyer, joined by Chief Justice Roberts and, in part, by Justice Alito. Part II of this Article places *Randall* in the context of the Supreme Court's campaign finance jurisprudence, and details the plurality's new approach to judging the constitutionality of low contribution limits. It shows that *Randall* marks a definite shift away from the New Deference, though it is hard to predict how far the Court ultimately will move away from that approach.

At first glance, the plurality opinion in *Randall* appears to add a level of coherence to campaign finance law by judging the constitutionality of such laws through an assessment of the relationship between campaign contribution limits and political competition. That result appears to be good news both for those who want a more coherent doctrine and for those who believe that courts should judge election laws primarily through an assessment of the law's anticompetitive effect. Alas, the appearance of coherence is illusory, and there is little reason to believe *Randall* marks a significant move by the Courts to embrace the "political markets" approach.

As Part III explains, the Court in *Randall* has not embraced competition as the organizing principle for analyzing the constitutionality of all campaign finance laws or election laws. Far from it. The focus on competition—which garnered the votes of only three Justices, and one of the three noncommittally—appears to be the outcome of a compromise between Justice Breyer, who wanted to preserve as much of existing doctrine as possible against a deregulationist trend, and the two newest Justices on the Court. Competition arose in *Randall* to test the constitutionality of low contribution limits as a rear-guard action by Justice Breyer to cling to the framework of *Buckley v. Valeo*,<sup>9</sup> and not out of a larger Court commitment to using courts to promote competition. Indeed, the Court's recent political gerrymandering cases reject competition as an organizing principle. In any case, the Court's use of competition in *Randall* appears evanescent, perhaps to be replaced in a few years with a more coherent, but considerably less deferential, deregulationist approach.

Part III shows that the competition test for low contribution limits does not fit coherently into the Supreme Court's larger campaign finance or election law jurisprudence. Part IV then turns from *external* coherence to the *internal* coherence of the competition test for low contribution limits, finding the test less predictable and coherent than its technocratic nature suggests. The plurality's test appears to rely in large part on social science evidence about the localized effects of contribution limits on competition: if contribution limits are so low as to prevent candidates in a particular

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<sup>9</sup> 424 U.S. 1 (1976).

jurisdiction from raising adequate resources in competitive elections, the limits must be struck down. But the social science literature regarding the effects of low contribution limits on political competition is indefinite, with the most recent studies suggesting that contribution limits *promote* political competition. Moreover, the plurality's analysis ignores the *adaptation* that occurs among political actors when the rules change. There is good reason to believe that candidates in competitive races could continue to run competitive races even with low contribution limits as candidates and parties adopt strategies to attract enough donors to provide money to run a competitive race. That is, the very "hydraulic effect" of campaign financing (money flows in new directions when stopped in one place) suggests that low contribution limits often will not prevent the amassing of funds for the running of competitive campaigns. I use the example of post-BCRA fundraising to illustrate this point.

Following *Randall*, it appears that challenges to low contribution limits will turn—or at least appear to turn—upon fact-intensive political science expert testimony about the amount of money necessary to run a competitive race in the relevant jurisdiction. But such testimony often will be speculative when it comes to whether enough money may be raised (by the candidates or others) to insure a competitive race. Court decisions could well turn upon a thin credibility determination to be made by the court, a determination that may depend not so much upon an evaluation of social science but upon each judge's predisposition to favor or oppose the particular campaign finance regulation. As we shall see, the *Randall* plurality itself rejected contrary evidence from the Burlington mayoral race showing vigorous competition in the face of low contribution limits on grounds that the facts of that race were "not described in sufficient detail to offer a convincing refutation"<sup>10</sup> of the opponents' expert studies.

Having found the new campaign finance jurisprudence of *Randall* as incoherent as its predecessor jurisprudence, I advocate in Part V a more coherent approach that the Court should use in judging the constitutionality of low campaign contribution limits and other campaign finance laws. Courts should engage in a careful and honest balancing that gives considerable deference to the value judgments made by states in enacting campaign finance laws, but then use close scrutiny to make sure the measure is carefully drawn to meet those goals. If the measure is not closely drawn, the court should strike it down as unconstitutional. If it is closely drawn, the court must then consider whether the measure is nonetheless unconstitutional because of the speech and association costs it imposes.

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<sup>10</sup> *Randall*, 126 S. Ct. at 2496 (plurality opinion).

This kind of honest balancing was impossible in *Randall* because of the Court's existing campaign finance jurisprudence. Vermont was forced to defend its law on grounds that it was necessary to prevent corruption or the appearance of corruption, but it had no real evidence to offer to prove that such low contribution limits really were necessary to prevent corruption or its appearance. It seems quite obvious that the real goal of the Vermont measure, hidden from debate in order to comply with *Buckley*, was the promotion of political equality. Thus, the real question the *Randall* Court should have asked is whether the Vermont law was closely drawn to promote political equality and, if so, whether the costs to individuals and groups who wanted to mobilize for political action was too great to allow the law to go forward despite its gains in promoting political equality.

One criticism I expect is that my approach is a no more coherent or predictable means of judging the constitutionality of campaign finance laws than the current and earlier approaches that I have criticized. But coherence emerges through transparency. Courts appear to already be engaged in a *sub silentio* balancing of rights and interests, in a convoluted and hidden way because of the legacy of *Buckley*. By having judges engage in balancing openly and forthrightly, we will be better able to examine and judge the value choices made by judges. The giving of real reasons will impose some rationality on the system. Social science, and what it can tell us about the effects of campaign finance law on competition, can help in this honest balancing process, but social science is no substitute for judicial balancing.

## II. LET'S DO THE TIME WARP AGAIN: *BUCKLEY'S* (TEMPORARY?) RESURRECTION IN *RANDALL*

### A. *Before Randall: From Buckley to Skepticism to Deference*<sup>11</sup>

Current campaign finance jurisprudence traces its origins to the Supreme Court's 1976 per curiam decision in *Buckley v. Valeo*,<sup>12</sup> which (among other things<sup>13</sup>) upheld against a First Amendment challenge an individual \$1,000 contribution limit in federal elections and struck down limits on spending by

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<sup>11</sup> This section offers a thumbnail sketch of the Supreme Court's campaign finance jurisprudence. For a more detailed discussion, see RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 104–20 (2003) and Hasen, *supra* note 5, at 35–46. This section draws from those earlier discussions.

<sup>12</sup> 424 U.S. 1 (1976).

<sup>13</sup> The Court also upheld campaign finance disclosure rules and a voluntary public financing system for presidential campaigns. It struck down the means of choosing members of the Federal Election Commission. See Hasen, *supra* note 5, at 37.

candidates and individuals. *Buckley* itself was drafted by committee, and some of its internal inconsistencies may best be explained by tensions in reasoning among the authors of its various parts.<sup>14</sup>

Although recognizing that any law regulating campaign financing was subject to the “exacting scrutiny required by the First Amendment,”<sup>15</sup> the Court mandated divergent treatment of contributions and expenditures for two reasons. First, the Court held that campaign expenditures were core political speech, but a limit on the amount of campaign contributions only marginally restricted a contributor’s ability to send a message of support for a candidate.<sup>16</sup> Thus, expenditures were entitled to greater constitutional protection than contributions. Second, the *Buckley* Court recognized only the interests in prevention of both corruption and the appearance of corruption as justifying infringement on First Amendment rights.

The Court held that large contributions raise the problem of corruption “[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders.”<sup>17</sup> But truly independent expenditures do not raise the same danger of corruption because a *quid pro quo* is more difficult if politician and spender cannot communicate about the expenditure.<sup>18</sup>

With the corruption interest having failed to justify a limit upon independent expenditures, the Court considered the alternative argument that expenditure limits were justified by “the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections.”<sup>19</sup> In one of the most famous (some would say notorious) sentences in *Buckley*, the Court rejected this equality rationale for campaign finance regulation, at least in the context of expenditure limits: “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .”<sup>20</sup>

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<sup>14</sup> See Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241 (2003). The muddled reasoning of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), may also be explained as the result of political compromise. See HASEN, *supra* note 11, at 113–14.

<sup>15</sup> *Buckley*, 424 U.S. at 16.

<sup>16</sup> *Id.* at 21.

<sup>17</sup> *Id.* at 26–27.

<sup>18</sup> *Id.* at 46–47.

<sup>19</sup> *Id.* at 48.

<sup>20</sup> *Id.* at 48–49. Seven of the eight Justices deciding the case concurred in this statement (Justice Stevens, new to the Court, did not participate) though the drafting history reveals that at least two more of the Justices were ambivalent about the equality rationale. See HASEN, *supra* note 11, at 108.

Specifically on the question of the *amount* of the contribution limits, the *Buckley* Court showed great deference to legislative judgments. For example, the Court refused to find the amount of the individual contribution limits set by the Federal Election Campaign Act (FECA) 1974 amendments at \$1,000 (around \$3,600 in 2006 dollars<sup>21</sup>) was too low.<sup>22</sup> The amount of contribution limitations would raise constitutional problems only when they prevented candidates and committees from “amassing the resources necessary for effective advocacy.”<sup>23</sup> But the court saw no danger in the FECA limits. In a footnote, the Court noted that “[i]n 1974, two major-party senatorial candidates, Ramsey Clark and Senator Charles Mathias, Jr., operated large-scale campaigns on contributions raised under a voluntarily imposed \$100 contribution limitation.”<sup>24</sup> The Court was much less deferential to Congress in other portions of the *Buckley* opinion, however, especially when it came to striking down spending limits.

Thus, the seeds of the Supreme Court’s later incoherence in the campaign finance area were sown in *Buckley*, with parts of the opinion expressing deference to legislative judgments and other parts showing much less deference. The Supreme Court’s campaign finance cases from *Buckley* until *Randall* divide into two periods, a period of skepticism followed by a period of deference, though in both periods the Court has always proclaimed it has followed the *Buckley* mandate.<sup>25</sup> Because of *Buckley*’s internal schizophrenia, these proclamations have always passed the laugh test.

In the period of skepticism immediately following *Buckley*, the Court rejected limits on contributions and on corporate expenditures in ballot measure campaigns,<sup>26</sup> using language in those cases that elevated the First Amendment over other plausible state interests in limiting campaign financing such as preserving voter confidence in the integrity of the electoral process.<sup>27</sup> In another case from the period of skepticism, the Court rejected a

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<sup>21</sup> Calculated using the “inflation calculator” at the Bureau of Labor Statistics website, <http://www.bls.gov>.

<sup>22</sup> *Buckley v. Valeo*, 424 U.S. 1, 30 (1976).

<sup>23</sup> *Id.* at 21.

<sup>24</sup> *Id.* at 21 n.23.

<sup>25</sup> See Allison Hayward, *The Per Curiam Opinion of Steel: Buckley v. Valeo as Superprecedent? Clues from Wisconsin and Vermont*, 2006 CATO SUP. CT. REV. 195, 205 n.58 (“Whatever their differences [between the periods of skepticism and deference], both sets of decisions *claim* faithfulness to *Buckley v. Valeo*.”).

<sup>26</sup> First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 767 (1978); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 299–300 (1981).

<sup>27</sup> See Hasen, *supra* note 3, at 885–86 (“These precedents emerged from the Supreme Court at the time of its greatest hostility to campaign finance regulation, when it



provision of federal law limiting independent spending in presidential campaigns when the candidates had agreed to accept voluntary public financing.<sup>28</sup> This latter case is most notable for its narrow definition of “corruption”<sup>29</sup> and for its deference to the lower court’s finding (and concomitant lack of deference to Congress, which passed the law) that the evidence of corruption or its appearance supporting the challenged law was “evanescent.”<sup>30</sup>

Following an important case in the 1990s upholding limits on corporate expenditures in candidate elections (under what looked very much like an equality rationale),<sup>31</sup> the Supreme Court in the 2000s shifted into a period of unprecedented deference to legislative decisions to enact campaign finance laws. The most important of these cases for our purposes was the Court’s 2000 opinion in *Nixon v. Shrink Missouri Government PAC*,<sup>32</sup> followed by *Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado II)*,<sup>33</sup> *Federal Election Commission v. Beaumont*,<sup>34</sup> and the *McConnell* case<sup>35</sup> noted in the Introduction.

The Court majority in *Shrink Missouri* upheld the constitutionality of Missouri’s low campaign contribution limits for state office against a First Amendment challenge and did so in four ways of jurisprudential significance.<sup>36</sup> First, the Court ratcheted down the level of scrutiny from *Buckley*’s “exacting” level of scrutiny to one in which interests need only be “sufficiently important”<sup>37</sup> and not narrowly tailored to the government’s

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viewed such laws as impermissibly impinging on the rights of free speech and association guaranteed by the First Amendment.”).

<sup>28</sup> Fed. Election Comm’n v. Nat’l Conservative Political Action Comm. (NCPAC), 470 U.S. 480, 497–98 (1985).

<sup>29</sup> “Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors.” *Id.* at 497.

<sup>30</sup> *Id.* at 499.

<sup>31</sup> *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990). On why the *Austin* rationale was a disguised equality rationale, see HASEN, *supra* note 11, at 111–14.

<sup>32</sup> 528 U.S. 377, 399 (2000).

<sup>33</sup> 533 U.S. 431 (2001).

<sup>34</sup> 539 U.S. 146 (2003).

<sup>35</sup> *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

<sup>36</sup> I provide greater details on these claims in Richard L. Hasen, *Shrink Missouri, Campaign Finance, and “The Thing that Wouldn’t Leave,”* 17 CONST. COMMENT. 483, 490–97 (2000).

<sup>37</sup> *Shrink Missouri*, 528 U.S. at 388.

interest.<sup>38</sup> Second, the Court expanded the definition of corruption and the appearance of corruption sufficient to justify campaign finance regulation. The Court explained that corruption extended beyond *quid pro quo* arrangements to embrace “the broader threat from politicians too compliant with the wishes of large contributors.”<sup>39</sup> As for the appearance of corruption, the Court remarked: “Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.”<sup>40</sup>

Third, the Court lowered the evidentiary burden for proving corruption or its appearance. The Court began by noting that “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.”<sup>41</sup> Although the Court insisted that “mere conjecture”<sup>42</sup> was not enough to support a campaign limit, it held that Missouri could justify the need for its contribution limits to fight corruption or the appearance of corruption by some pretty flimsy evidence: the affidavit from a Missouri legislator who had supported the legislation stating that “large contributions have ‘the real potential to buy votes,’”<sup>43</sup> newspaper accounts suggesting possible corruption in Missouri politics; and the passage of an earlier Missouri voter initiative establishing campaign contribution limits.

Fourth, the Court created a difficult test for challenging the constitutionality of a contribution limit as too low to prevent effective advocacy. Refining (or changing) the effective advocacy test from *Buckley*, the Court stated: “We asked, in other words, whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.”<sup>44</sup> In an era of faxes, web pages, and e-mails, it is hard to imagine any contribution limit that would fail the *Shrink Missouri* test of constitutionality.

*Shrink Missouri* was also the case where Justice Breyer, in a concurring opinion, first set forth application of his participatory self-government rationale to campaign finance questions. Remarking that *Buckley*’s statement rejecting the equality rationale being wholly foreign to the First Amendment

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<sup>38</sup> *Id.* (noting “the dollar amount of the limit need not be ‘fine tun[ed]’”).

<sup>39</sup> *Id.* at 389.

<sup>40</sup> *Id.* at 390.

<sup>41</sup> *Id.* at 391.

<sup>42</sup> *Id.* at 392.

<sup>43</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 393 (2000).

<sup>44</sup> *Id.* at 397.

“cannot be taken literally,”<sup>45</sup> Justice Breyer posited that “constitutionally protected interests lie on both sides of the legal equation.”<sup>46</sup> He explained:

On the one hand, a decision to contribute money to a campaign is a matter of First Amendment concern—not because money *is* speech (it is not); but because it *enables* speech . . . . On the other hand, restrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action. Moreover, by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear on the electoral process. In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.<sup>47</sup>

Justice Breyer then called for deference to the legislature's understanding of “the threat to electoral integrity [and] the need for democratization,”<sup>48</sup> though not for deference with respect to whether a contribution limit “significantly increases the reputation-related or media-related advantages of incumbency.”<sup>49</sup>

The other three cases making up the “New Deference Quartet” continued this trend toward relaxing *Buckley*'s rules, though the details are not important for purposes of this Article.<sup>50</sup> Throughout this transition to the New Deference, the Court continued to give lip service to fidelity to *Buckley*, all the while moving toward a level of deference consistent with Justice Breyer's participatory self-government rationale. By the time the Court decided the *McConnell* case, upholding almost all of the challenged provisions of McCain-Feingold, *Buckley* appeared dead in all but name.<sup>51</sup>

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<sup>45</sup> *Id.* at 402 (Breyer, J., concurring).

<sup>46</sup> *Id.* at 400 (Breyer, J., concurring).

<sup>47</sup> *Id.* at 400–01 (Breyer, J. concurring) (citation omitted).

<sup>48</sup> *Id.* at 403 (Breyer, J., concurring).

<sup>49</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 404 (2000) (Breyer, J., concurring). On this point, Justice Breyer wrote that the statutory limit was “low enough to raise such a question. But given the empirical information presented . . . I agree with the Court that the statute does not work disproportionate harm.” *Id.*

<sup>50</sup> For details, see Hasen, *supra* note 5, at 44–57.

<sup>51</sup> See *id.* for a sustained argument on this point. But see Daniel H. Lowenstein, *BCRA and McConnell in Perspective*, 3 ELECTION L.J. 277, 282 (2004) (writing soon after the *McConnell* case: “*Buckley* is not only not dead, it may not be dying at all.”).

## B. Randall *Resurrects* Buckley, *Perhaps Killing* Shrink Missouri

In *Randall v. Sorell*,<sup>52</sup> the Supreme Court considered the constitutionality of contribution and expenditure limits imposed in 1997 by the Vermont Legislature through Vermont's "Act 64."<sup>53</sup> The case marked the first campaign finance case heard by both of the two new Justices on the Supreme Court, Chief Justice Roberts and Justice Alito.<sup>54</sup> Justice Alito's presence was particularly important, because the most recent New Deference case, *McConnell*, was decided on a 5-4 vote, and Justice Alito replaced a member of the *McConnell* 5-Justice majority, Justice O'Connor. Before the case was decided there was much speculation as to how Justice O'Connor's replacement could change campaign finance law.<sup>55</sup>

Act 64 imposed both candidate spending limits and contribution limits:

Act 64 imposes mandatory expenditure limits on the total amount a candidate for state office can spend during a "two-year general election cycle," *i.e.*, the primary plus general election, in approximately the following amounts: governor, \$300,000; lieutenant governor, \$100,000; other statewide offices \$45,000; state senator, \$4,000 (plus an additional \$2,500 for each additional seat in the district); state representative (two-member district), \$3,000; and state representative (single member district), \$2,000. These limits are adjusted for inflation in odd-numbered years based on the Consumer Price Index.<sup>56</sup>

The Act also imposed additional limits on incumbents seeking election, and defined "expenditure[s]" broadly.<sup>57</sup> Moreover, Act 64 treated certain expenditures made by others against a candidate's limit. "These provisions apply so as to count against a campaign's expenditure limit any spending by

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<sup>52</sup> 126 S. Ct. 2479 (2006).

<sup>53</sup> VT. STAT. ANN. tit. 17, § 2801 (2002).

<sup>54</sup> Chief Justice Roberts, but not Justice Alito, heard the *Wisconsin Right to Life* case, but that case resulted in a remand rather than an opinion of any broad significance. See *supra* note 8.

<sup>55</sup> Writing before Justice Alito's appointment to the Supreme Court, Richard Briffault observed: "If Chief Justice Roberts and Justice O'Connor's successor join [Justices Scalia, Thomas, and Kennedy], then *Buckley* could fall—but in the opposite direction sought by reform advocates." Richard Briffault, *U.S. Supreme Court Case Preview, A Changing Supreme Court Considers Major Campaign Finance Questions: Randall v. Sorell, and Wisconsin Right to Life v. FEC*, 5 ELECTION L.J. 74, 83 (2006).

<sup>56</sup> *Randall*, 126 S. Ct. at 2486 (plurality opinion).

<sup>57</sup> *Id.*

political parties or committees that is coordinated with the campaign and benefits the candidate.”<sup>58</sup>

As for the contribution limits, Act 64 also imposed strict contribution limits:

The amount any single individual can contribute to the campaign for a candidate for state office during a “two-year general election cycle” is limited as follows: governor, lieutenant governor, and other statewide offices, \$400; state senator, \$300; and state representative, \$200. Unlike its expenditure limits, Act 64’s contribution limits are not indexed for inflation.

A political committee is subject to these same limits. So is a political party, defined broadly to include “any subsidiary, branch or local unit” of a party, as well as any “national or regional affiliates” of a party (taken separately or together). Thus, for example, the statute treats the local, state, and national affiliates of the Democratic Party as if they were a single entity and limits their total contribution to a single candidate’s campaign for governor (during the primary and general election together) to \$400.<sup>59</sup>

In considering the constitutionality of both the expenditure and contribution limits, the nine Justices issued six opinions.<sup>60</sup> Unsurprisingly, a majority of the Court held that the candidate *spending limits* were

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<sup>58</sup> *Id.* Moreover, “any party expenditure that ‘primarily benefits six or fewer candidates who are associated with the political party’ is ‘presumed’ to be coordinated with the campaign and therefore to count against the campaign’s expenditure limit.” *Id.*

<sup>59</sup> *Id.* (citations omitted).

<sup>60</sup> Just a few days later, in deciding the Texas redistricting case, the Justices again issued six opinions, *LULAC v. Perry*, 126 S. Ct. 2594 (2006), showing just how fractured the new Roberts Court is on some election law questions. *See generally* Richard L. Hasen, *Political Portents: Latest Supreme Court Rulings on Election Law May Foreshadow a Far More Conservative Approach*, *LEGAL TIMES*, July 10, 2006, at 52 (“The nine justices issued a staggering 12 opinions in the two cases, leaving even seasoned election-law scholars scratching their heads over the intricacies of the opinions.”).

unconstitutional under *Buckley*.<sup>61</sup> For the foreseeable future, constitutional challenges to the spending limit holding of *Buckley* now appear foreclosed.<sup>62</sup>

The Court's treatment of the *contribution limits* question, however, is far more interesting in revealing the possible future direction of its campaign finance jurisprudence, especially because the Court had to somehow deal with the recent *Shrink Missouri* precedent setting forth a very deferential test for judging the constitutionality of campaign contribution limits alleged to be too low. Would *Shrink Missouri*, the band leader of the New Deference Quartet, cause the Court to continue to play the notes of judicial deference?

*Randall* answered that question in the negative. On the constitutionality of Vermont's contribution limits, the Court broke into essentially three camps:

*Group 1: The Deference Justices.* Three Justices (Ginsburg, Souter, and Stevens) would have upheld the Vermont contribution limits under *Shrink Missouri*, holding that campaign contribution limits should be struck down only when they are "laughabl[y]"<sup>63</sup> low and when they would depress candidates' voices "to the level of political inaudibility."<sup>64</sup> For these Justices, the New Deference remains the appropriate legal standard.

*Group 2: The Deregulationists.* Two Justices (Scalia and Thomas) would have struck down the Vermont contribution limits not because they were unconstitutionally low, but out of a belief that *all* contribution limits

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<sup>61</sup> *Randall*, 126 S. Ct. at 2491 (plurality opinion); *id.* at 2501–02 (Kennedy, J., concurring in the judgment) (agreeing that the expenditure limits violate the First Amendment); *id.* at 2501 (Thomas, J., joined by Scalia, J., concurring in the judgment) (agreeing that Act 64 is unconstitutional). Only Justice Stevens voted to uphold the expenditure limits. *Id.* at 2506 (Stevens, J., dissenting). Justices Souter and Ginsburg would not have reached the issue, preferring to "adhere to the Court of Appeals' decision to remand for further enquiry bearing on the limitations on candidates' expenditures." *Id.* at 2511 (Souter, J., joined by Ginsburg, J., dissenting).

<sup>62</sup> Before the composition of the Court changed, I suggested that the Court might be poised to accept the constitutionality of spending limits in certain circumstances. See Hasen, *supra* note 5, at 67–70. But once the Second Circuit had ordered a remand on the expenditure limits question, I believe it was a mistake for the supporters of the law to support, rather than oppose, the petition for a writ of certiorari filed by Act 64's opponents—particularly given the strictness of Vermont's spending limits. See Posting of Rick Hasen, "How Smart Was It For Plaintiffs To Support Cert in the Vermont Spending Limits Case?," to Election Law Blog, <http://electionlawblog.org/archives/003606.html> (June 16, 2005, 18:06 EST). And I expressed even greater reservations on going forward once Justice O'Connor announced her retirement. Posting of Rick Hasen, "Responding to Brad Smith on Spending Limits Question," to Election Law Blog, <http://electionlawblog.org/archives/004181.html> (Sept. 30, 2005, 11:54 EST).

<sup>63</sup> *Randall*, 126 S. Ct. at 2514 (Souter, J., dissenting).

<sup>64</sup> *Id.* at 2516 (Souter, J., dissenting).

should be subject to strict scrutiny and struck down as a violation of the First Amendment.<sup>65</sup> Justice Kennedy was a bit less categorical than Justices Scalia and Thomas, but he agreed that the Vermont contribution limits were unconstitutional, being “even more stifling than the ones that survived *Shrink*’s unduly lenient review.”<sup>66</sup>

*Group 3: The Plurality.* Three Justices (Alito, Breyer, and Chief Justice Roberts) form the new center of the Court on campaign finance issues. I cannot give Group 3 a descriptive name beyond “The Plurality,” because, as we shall see, it is unclear whether this group will stick together beyond this one case, and, if so, what the group’s position will be on other campaign finance issues.<sup>67</sup> Indeed, Justice Alito added a separate short concurrence in *Randall* in which he noted that he decided this case in line with his understanding of *Buckley*, and that he was not committing himself one way or another to the question whether *Buckley*’s campaign finance jurisprudence was worth “reexamining” in a case squarely presenting the question.<sup>68</sup> This leaves open the possibility that he (and perhaps Chief Justice Roberts) will join The Deregulationists when a case squarely presents the question of *Buckley*’s continued vitality.

The plurality purported to apply existing precedent, including *Buckley* and *Shrink Missouri*, to reach the conclusion that the Vermont contribution limits, unlike the limits upheld in other cases including *Shrink Missouri*, were too low.<sup>69</sup> Because this plurality forms the controlling block of votes

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<sup>65</sup> *Id.* at 2502 (Thomas, J., concurring in the judgment) (“I would overrule *Buckley* and subject both the contribution and expenditure restrictions of Act 64 to strict scrutiny, which they would fail.”).

<sup>66</sup> *Id.* at 2501 (Kennedy, J., concurring in the judgment).

<sup>67</sup> In this way, the opinion reads much like the Court’s 1996 campaign finance decision in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) (*Colorado I*), a decision featuring a three-Justice plurality of Justices Breyer, O’Connor, and Souter. Ned Foley first noted the parallels between the two cases in an untaped conference call among election law specialists organized by Professor Nate Persily of University of Pennsylvania Law School on June 26, 2006, a few hours after the decision in *Randall*. *Colorado I* ducked major constitutional issues before Justices Breyer and Souter got their “sea legs” on the campaign finance issue. See Hasen, *supra* note 5, at 42. It would have been difficult to predict from *Colorado I* how these Justices would ultimately vote in the campaign finance cases that came just a few years later.

<sup>68</sup> *Randall*, 126 S. Ct. at 2501 (Alito, J., concurring in part and concurring in the judgment).

<sup>69</sup> *Id.* at 2500 (plurality opinion). Both Justice Thomas and Justice Souter convincingly argued that the plurality opinion was inconsistent with *Shrink Missouri*. See *id.* at 2504 (Thomas, J., concurring in the judgment) (“The plurality’s current treatment of the limits in *Shrink* as a constitutional minimum, or at least as limits below which ‘danger signs’ are present, thus cannot be reconciled with *Shrink* itself.”); *id.* at 2513

on the Court on the question of low contribution limits, it is worth examining its analysis in some detail.

The plurality draws its constitutional test from the concern noted in *Buckley* over contribution limits being so low as to prevent candidates from amassing resources necessary to engage in effective advocacy.<sup>70</sup> The plurality opinion notes: "At some point the constitutional risks . . . [from low contribution limits] become too great . . . . [C]ontribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability."<sup>71</sup> Citing his own concurring opinion in *Shrink Missouri* setting forth the participatory self-government rationale, Justice Breyer for the plurality added: "[I]ndividual members of the Court have expressed concern lest too low a limit magnify the 'reputation-related or media-related advantages of incumbency and thereby insulat[e] legislators from effective electoral challenge.'"<sup>72</sup>

The plurality sets forth a two-part test for judging the constitutionality of the *amount* of a campaign contribution limit in the "exercise of independent judicial judgment."<sup>73</sup>

(1) Are there "danger signs" that the risks to the political process in terms of decreased political competition are too high?<sup>74</sup>

(2) If so, based on a review of the record, is the measure "closely drawn," or is it too restrictive given the anticorruption goals it is trying to accomplish?<sup>75</sup>

Applying this two-part test, the plurality held that Vermont's \$200–\$400 contribution limits per election cycle were unconstitutional.<sup>76</sup> Under the first part of the test, the plurality concluded: "As compared with the contribution limits upheld by the Court in the past, and with those in force in other States, Act 64's limits are sufficiently low as to generate suspicion that they are not closely drawn."<sup>77</sup> The plurality pointed to these factors:

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(Souter, J., dissenting) ("To place Vermont's contribution limits beyond the constitutional pale, therefore, is to forget not only the facts of *Shrink*, but also our self-admonition against second-guessing legislative judgments about the risk of corruption to which contribution limits have to be fitted.").

<sup>70</sup> See *supra* text accompanying note 23.

<sup>71</sup> *Randall*, 126 S. Ct. at 2492 (plurality opinion).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2491 (plurality opinion); see also *id.* at 2494 (plurality opinion).

<sup>76</sup> *Id.* at 2500 (plurality opinion).

<sup>77</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2492–93 (2006) (plurality opinion).



- Vermont's limits apply per election cycle (that is, a single limit applied to contributions made during both the primary and general election), not per election—so they are essentially half the size they appear to be.<sup>78</sup>

- The limits are very low, especially compared to amounts the Court has upheld in the past, as adjusted for inflation.<sup>79</sup>

- The amounts are very low when compared to other state limits (seven states have contribution limits at or below \$500 per election, twice the Act 64 limits).<sup>80</sup>

- No state has a limit lower than \$200 on contributions from political parties to candidates.<sup>81</sup>

- The amount is well below any limit previously upheld. In making this comparison, the Court looked at the amount of contributions per citizen (“As of 2006, the ratio of the contribution limit to the size of the constituency in Vermont is .00064, while Missouri’s ratio is .00044, 31% lower.”), as well as the type of race involved (“A campaign for state auditor is likely to be less costly than a campaign for governor; campaign costs do not automatically increase or decrease in precise proportion to the size of an electoral district.”).<sup>82</sup>

Once the plurality determined that there were “danger signs,”<sup>83</sup> it moved to the second part of the test. Under this part, the court must “independently and carefully . . . determine whether [the measure’s] contribution limits are ‘closely drawn’ to match the State’s interests.”<sup>84</sup> For five reasons, the plurality held that the Vermont limit was not closely drawn and was therefore unconstitutional:

- “*First*, the record suggests, though it does not conclusively prove, that Act 64’s contribution limits . . . [are too] . . . restrict[ive].”<sup>85</sup> Much of this analysis depended upon the testimony of expert witnesses.<sup>86</sup>

- “*Second*, Act 64’s insistence that political parties abide by *exactly* the same low contribution limits that apply to other contributors threatens harm to a particularly important political right, the right to associate in a

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<sup>78</sup> *Id.* at 2493 (plurality opinion).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 2494 (plurality opinion).

<sup>82</sup> *Id.*

<sup>83</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2494 (2006) (plurality opinion).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2495 (plurality opinion).

<sup>86</sup> *Id.* at 2495–96 (plurality opinion).

political party.”<sup>87</sup> The plurality also detailed other ways in which the law hampers political parties.<sup>88</sup>

- “*Third*, the Act’s treatment of volunteer services aggravates the problem . . . . [T]he Act does not exclude the expenses those volunteers incur, such as travel expenses, in the course of campaign activities.”<sup>89</sup> “That combination, low limits and no exceptions, means” volunteers could easily exceed the contribution limit through minimal activity such as travel or giving doughnuts to neighbors.<sup>90</sup>

- “*Fourth*, unlike the contribution limits we upheld in *Shrink*, . . . Act 64’s contribution limits are not adjusted for inflation.”<sup>91</sup>

- “*Fifth*, we have found nowhere in the record any special justification that might warrant a contribution limit so low or so restrictive as to bring about the serious associational and expressive problems that we have described.”<sup>92</sup>

The Court concluded that the limits “violate the First Amendment, for they burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance.”<sup>93</sup>

Whatever else one may say about the plurality opinion, it certainly marks a pause, and perhaps the end, of the New Deference approach in the campaign finance cases.<sup>94</sup> Rather than ask the deferential question, as Justice Souter did in his dissent, whether Vermont’s contribution limits would drive a candidate’s voice to the “level of political inaudibility,”<sup>95</sup> the *Randall* plurality commanded the use of “independent judicial judgment”<sup>96</sup> to determine if the Vermont contribution limits were unconstitutionally low. In exchange for Justice Breyer’s language in *Shrink Missouri* urging legislative

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<sup>87</sup> *Id.* at 2496 (plurality opinion).

<sup>88</sup> For example, the plurality noted that “the Act would severely inhibit collective political activity by preventing a political party from using contributions by small donors to provide meaningful assistance to any individual candidate.” *Id.* at 2497 (plurality opinion).

<sup>89</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2498 (2006) (plurality opinion).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 2499 (plurality opinion).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 2500 (plurality opinion).

<sup>94</sup> See Edward B. Foley, *The Importance of Randall’s Indecisiveness*, ELECTION LAW@MORITZ WEEKLY COMMENT, June 27, 2006, <http://moritzlaw.osu.edu/electionlaw/comments/2006/060627.php> (noting the importance of the *Randall* plurality’s non-reliance on *Shrink Missouri*).

<sup>95</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2516 (2006) (Souter, J., dissenting).

<sup>96</sup> *Id.* at 2492 (plurality opinion).

deference on grounds that the legislature understands the problems of campaigns better than the Court,<sup>97</sup> the *Randall* plurality expressed skepticism of legislative judgments and legislative solutions. Rather than declaring, as the Court did in *Shrink Missouri*, that “the dictates of the First Amendment are not mere functions of the Consumer Price Index,”<sup>98</sup> the *Randall* plurality found the failure of Vermont to index its limits for inflation a reason to strike down its contribution limits.<sup>99</sup> Rather than note, as Justice Breyer did in his *Shrink Missouri* concurrence, that *Buckley*’s rejection of the equality rationale for campaign finance reform “cannot be taken literally,”<sup>100</sup> the *Randall* plurality chose not to even mention the

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<sup>97</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring). Indeed, in his book *Active Liberty*, Justice Breyer writes:

Courts can defer to the legislature’s own judgment insofar as that judgment concerns matters (particularly empirical matters) about which the legislature is comparatively expert, such as the extent of the campaign finance problem, a matter that directly concerns the realities of political life. But courts should not defer when they evaluate the risk that reform legislation will defeat the participatory self-government objective itself. That risk is present, for example, when laws set contribution limits so low that they elevate the reputation-related or media-related advantages of incumbency to the point of insulating incumbent officeholders from effective challenge.

BREYER, *supra* note 4, at 49. In support of this statement, Justice Breyer cites to this passage from the *McConnell* case extolling the virtues of deference to legislators:

Because the electoral process is the very “means through which a free society democratically translates political speech into concrete governmental action,” *Shrink Missouri*, 528 U.S. at 401 (BREYER, J., concurring), contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate. For that reason, when reviewing Congress’ decision to enact contribution limits, “there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words ‘strict scrutiny.’” *Id.* at 400 (BREYER, J., concurring). The less rigorous standard of review we have applied to contribution limits (*Buckley*’s “closely drawn” scrutiny) shows proper deference to Congress’ ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.

*McConnell v. FEC*, 540 U.S. 93, 137 (2003).

<sup>98</sup> *Shrink*, 528 U.S. at 397.

<sup>99</sup> *Randall*, 126 S. Ct. at 2499 (plurality opinion).

<sup>100</sup> *Shrink*, 528 U.S. at 402 (Breyer, J., concurring).

equality rationale rejected in *Buckley*, referring to it simply as one of the “other” interests rejected by the *Buckley* Court.<sup>101</sup>

In the end, those who thought *Buckley* was dead have had to witness its Second Coming. *Shrink Missouri* has been dealt a perhaps-fatal blow, and the future of the Court’s campaign finance jurisprudence—especially given Justice Alito’s tantalizing invitation for plaintiffs to argue that *Buckley*’s contribution limit holding should be overruled<sup>102</sup>—has become subject to considerable uncertainty.

The shelf life of *Randall* may be short. If and when Chief Justice Roberts and Justice Alito become ready to move into the deregulationist camp, Justice Kennedy would hold the controlling vote on campaign finance questions, and it is unclear whether he would vote to overrule *Buckley* on contribution limits so as to disallow all contribution limits or simply continue to apply *Buckley* in the stringent way he interprets it.<sup>103</sup> But

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<sup>101</sup> *Randall*, 126 S. Ct. at 2488 (plurality opinion) (“The Court [in *Buckley*] also considered other governmental interests advanced in support of expenditure limitations. It rejected each.”).

<sup>102</sup> *Id.* at 2500–01 (Alito, J., concurring in part and concurring in the judgment).

<sup>103</sup> On this point, it is worth recalling that Justice Kennedy has never gone so far as Justice Thomas’s calls to overrule *Buckley* and subject all contribution limits to strict scrutiny, which they would fail. Compare *Shrink Missouri*, 528 U.S. at 409–10 (Kennedy, J., dissenting) (stating a desire to overrule *Buckley*, but leaving “open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising”), with *id.* at 412 (Thomas, J., joined by Scalia, J., dissenting) (“[C]ontributions to political campaigns generate essential political speech. And contribution caps, which place a direct and substantial limit on core speech, should be met with the utmost skepticism and should receive the strictest scrutiny.”). Indeed, after *Shrink Missouri*, Justice Kennedy applied *Buckley* to uphold one portion of BCRA’s soft money rules against constitutional challenge, *McConnell v. FEC*, 540 U.S. 93, 308 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part with respect to BCRA Titles I and II), a vote that put him at odds with Justices Scalia and Thomas. See *id.* at 248 (Scalia, J., concurring with respect to BCRA Titles III and IV, dissenting with respect to BCRA Titles I and V, and concurring in the judgment in part and dissenting in part with respect to BCRA Title II) (“I join the opinion of JUSTICE KENNEDY, except to the extent it upholds new § 323(e) of the Federal Election Campaign Act of 1971 (FECA) and § 202 of the Bipartisan Campaign Reform Act of 2002 (BCRA) in part.”); *id.* at 254 (Thomas, J., concurring with respect to BCRA Titles III and IV, except for BCRA §§ 311 and 318, concurring in the result with respect to BCRA § 318, concurring in the judgment in part and dissenting in part with respect to BCRA Title II, and dissenting with respect to BCRA Titles I, V, and § 311.).

*Randall* today is the law,<sup>104</sup> and it is worth examining whether the case creates more coherence in the campaign finance area than existed before it. As the next two sections show, *Randall* creates neither *external* coherence with respect to the Supreme Court's other campaign finance or election law cases nor *internal* coherence with respect to how lower courts will administer a test for judging the constitutionality of low contribution limits.

### III. *RANDALL*'S EXTERNAL INCOHERENCE AND THE SELECTIVE USE OF THE ANTI-COMPETITION PARADIGM

At first glance, the plurality opinion in *Randall* appears to add a level of coherence to campaign finance law by judging the constitutionality of such laws through an assessment of the relationship between campaign contribution limits and political competition. That result appears to be good news both for those who want a more coherent doctrine and for those who believe that courts should judge election laws primarily through an assessment of a law's anticompetitive effect or intent.

As Professor Pildes, one of the leading scholars advocating that the Supreme Court decide election law cases to promote political competition (which I'll refer to as the "structural" or political markets approach),<sup>105</sup> put it soon after the Court issued its decision in *Randall*:

Here is the key point: the Court in this decision makes as clear as it has in any constitutional decision involving democratic institutions that the Court views itself as having an essential role to play in preserving the structural integrity of the democratic process . . . [T]he decision rests on the principle that there is a risk that those who currently hold office—current legislators—can regulate elections in a way that insulates themselves improperly [from] competition and that undermines the integrity and accountability that should be central to democracy and democratic elections. Most importantly, constitutional law and the Supreme Court must play a role in responding to that risk, according to the principles of the Vermont decision.

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<sup>104</sup> Cf. Daniel H. Lowenstein, *Vieth's Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J.L. & PUB. POL'Y 367, 391 (2005) ("I am proceeding on the premise that the law is not a prediction of what the nine Justices will say in a future case nor a psychological inquiry into what they want, but what can fairly be gleaned from the decisions they have already issued.").

<sup>105</sup> The leading article embracing this approach is Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 681 (1998). For my critique, see HASEN, *supra* note 11, ch. 5.

Justice Breyer has long been drawn to exactly such a view, as I have noted in earlier articles. The principles on which this decision rests could have implications for many other issues concerning the Court's oversight, through constitutional law, of democratic politics. Consider gerrymandering, most obviously: gerrymandering can be viewed as creating many of the same kinds of harms—involving incumbent protection, threats to democratic accountability and to the integrity of elections—and might similarly not be thought to involve harms to conventional individual rights. The principles of today's Vermont case might well imply that courts have an essential role, nonetheless, in protecting the democratic system against various structural harms insiders are capable of causing to it. For that reason, the Vermont case is an intriguing and surprisingly important decision, with potentially broad implications throughout the law of democracy.<sup>106</sup>

Professor Pildes wrote these remarks in the hours after the Court issued its decision in *Randall* (and two days before the Court issued its opinion in *LULAC*). It may be that he no longer believes that *Randall* is a harbinger of the Court's embrace of the anti-competition principle in election law cases. But anyone who sees *Randall* in this light is likely to be mistaken. The anti-competition principle appears cabined to campaign finance cases, and likely applicable only to cases raising the question whether particular campaign contribution limits are too low.

The most important piece of evidence that the Court has not embraced (and is not likely to embrace any time soon), the anti-competition principle in its election law cases, is found in the Court's recent consideration of partisan gerrymandering claims. As Professor Pildes put it in his post-*Randall* remarks, gerrymandering is the "most obvious[]" place for the courts to rein in excessive anti-competitive actions by state legislatures, many of whom draw district lines for their own reelection (as well as to insure the election of their party allies in Congress).<sup>107</sup>

Two years before the Court decided *Randall*, it decided *Vieth v. Jubelirer*,<sup>108</sup> in which the Court split 4-1-4 over whether courts should impose limits on line-drawing done to achieve partisan gains. In *Vieth*, four Justices voted to hold partisan gerrymandering claims completely nonjusticiable. Justice Kennedy, the crucial fifth vote in *Vieth*, rejected the view that such cases are necessarily nonjusticiable, but he voted to reject the partisan gerrymandering claim on grounds that no one—not the parties,

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<sup>106</sup> Posting of Rick Pildes to SCOTUSblog, [http://www.scotusblog.com/movabletype/archives/2006/06/todays\\_opinion\\_11.html](http://www.scotusblog.com/movabletype/archives/2006/06/todays_opinion_11.html) (June 26, 2006, 11:44 EST).

<sup>107</sup> See *id.*

<sup>108</sup> 541 U.S. 267 (2004).

amici, nor the Supreme Court Justices writing dissents—had yet come up with a manageable standard for separating permissible consideration of voter party registration information from impermissible partisan gerrymandering.

Those advocating the anti-competition paradigm were at first heartened when the Court agreed to hear the Texas re-redistricting cases, consolidated under the name *LULAC v. Perry*.<sup>109</sup> Partisan gerrymandering was among the issues raised in *LULAC*. The battle appeared to be for the vote of Justice Kennedy, though if Chief Justice Roberts or Justice Alito were willing to join the four *Vieth* dissenters (Justices Breyer, Ginsburg, Souter, and Stevens), there could have been a majority to police partisan gerrymandering without Justice Kennedy's vote.

Professors Pildes, Issacharoff, and Neuborne filed an amicus brief<sup>110</sup> in *LULAC* urging that the Court use the Elections Clause<sup>111</sup>—giving the states the power to set the “times, places and manner” of congressional elections, subject to congressional override—to require legislatures to draw competitive congressional districts.<sup>112</sup> They urged the Court to read the Elections Clause in conjunction with other provisions of the Constitution to “prohibit state legislative efforts to systematically design non-competitive congressional election districts and frustrate the Constitution’s essential requirement that members of Congress be electorally accountable to the voters.”<sup>113</sup> They argued that at the very least *mid-decade* congressional redistricting done absent judicial compulsion or extraordinary circumstances (such as a population shifts after a Category Five hurricane) exceeded state legislative power under the Elections Clause.<sup>114</sup> Thus, these professors

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<sup>109</sup> 126 S. Ct. 2594 (2006).

<sup>110</sup> Brief for Samuel Issacharoff, Burt Neuborne, and Richard H. Pildes as Amici Curiae in Support of Appellants, *LULAC v. Perry*, 126 S. Ct. 2594 (2006) (Nos. 05-204, 05-254, 05-276, and 05-439) available at [http://www.jenner.com/files/tbl\\_s69NewsDocumentOrder/FileUpload500/539/Brief\\_Amici\\_Curiae\\_Issacharoff\\_Neuborne\\_Pildes.pdf](http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/539/Brief_Amici_Curiae_Issacharoff_Neuborne_Pildes.pdf).

<sup>111</sup> U.S. CONST. art. I, § 4, cl. 1.

<sup>112</sup> Brief for Samuel Issacharoff, Burt Neuborne, and Richard H. Pildes, *supra* note 110, at 6.

<sup>113</sup> *Id.* I suspect that the reason the authors suggested that the Elections Clause be read *in conjunction with* other parts of the Constitution, such as the First Amendment, was to allow a follow-up argument, if the Elections Clause argument was successful, challenging *state and local* redistricting for partisan advantage. After *LULAC*, the Court held that private parties sometimes lack standing to challenge redistricting decisions under the Elections Clause. *Lance v. Coffman*, 127 S. Ct. 1194, 1198 (2007) (*per curiam*).

<sup>114</sup> Brief for Samuel Issacharoff, Burt Neuborne, and Richard H. Pildes, *supra* note 110, at 21.

offered a “textual hook” for the Justices to embrace the structural anti-competitive approach and reject an individual rights approach to the question of partisan gerrymandering.

For Professor Pildes and others who agree with his approach, the *LULAC* decision was undoubtedly a profound disappointment.<sup>115</sup> The Elections Clause argument in particular and the anti-competition approach in general failed to gain traction in *LULAC*. Justice Kennedy did not discuss the approach in his opinion, which simply mirrored his statement in *Vieth* that no one has created any judicially manageable standards for judging partisan gerrymandering. Sticking with an individual rights approach to the question, Justice Kennedy wrote that a party challenging a districting plan as an unconstitutional partisan gerrymander must “show a burden, as measured by a reliable standard, on the complainants’ representational rights.”<sup>116</sup> He offered no clues on how to create such a standard, after offering clues in *Vieth* for litigants to look to the First Amendment, to history, and to technology.<sup>117</sup> In *LULAC*, Chief Justice Roberts and Justice Alito agreed with Justice Kennedy’s “determination that appellants have not provided ‘a

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<sup>115</sup> See Posting of Rick Pildes to SCOTUSblog, [http://www.scotusblog.com/movabletype/archives/2006/06/first\\_thoughts\\_1.html](http://www.scotusblog.com/movabletype/archives/2006/06/first_thoughts_1.html) (June 28, 2006, 13:32 EST) (“Looking forward on this issue, might partisan gerrymandering violate the Constitution in other contexts? Technically, the answer remains yes, as it has for many years now. Practically, though, the opinion makes it less likely the Court will find an actual violation. Chief Justice Roberts and Justice Alito once again signalled their unwillingness to confront precedents they did not have to address; showing a cautious moderation, both refused to take positions on the large question of whether partisan gerrymandering is ever unconstitutional. But Justice Kennedy rejected yet another effort to craft such a standard. Because Justice Kennedy has been more open to the possibility of such a standard, his rejection of every actual standard offered to him, including the one today, makes it harder for plaintiffs to win on partisan gerrymandering claims.”). Professor Issacharoff expressed similar disappointment at the *LULAC* decision in a public conference call among election law specialists organized by Professor Persily. Webcast: Panel Discussion Concerning the Supreme Court’s Decision in the Texas Redistricting Case (June 28, 2006), <http://muses.law.upenn.edu:8080/pennlaw/faculty/npersily/conference062806.mp3> (listen to Prof. Issacharoff at approximately 6 minutes into the webcast) (stating that the Supreme Court in *LULAC* sends “the message that the only way that the Court will entertain an attack on a partisan gerrymander is to frame it as a race question, and unfortunately that message comes through loud and clear in this opinion”).

<sup>116</sup> *LULAC v. Perry*, 126 S. Ct. 2594, 2610 (2006).

<sup>117</sup> For a criticism of these suggestions, see generally Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626 (2004).



reliable standard for identifying unconstitutional political gerrymanders,”<sup>118</sup> and they left open the possibility they would conclude in a future case that all such claims are nonjusticiable. They certainly stand at least with Justice Kennedy in rejecting all of the standards proposed to date.

The Court’s rejection of the anti-competition approach extends beyond its partisan gerrymandering jurisprudence. If anything, the Court has moved away from that approach in recent years. For example, the Court for the first time in 1997 recognized that state legislatures may choose election rules that favor the “two-party system” in the name of promoting political stability,<sup>119</sup> a decision that entrenches the existing two party duopoly rather than opening electoral competition up to third parties and independent candidates.<sup>120</sup> Even in recent cases where members of the Court have used rhetoric suggesting a concern over election laws stifling political competition,<sup>121</sup> the Court has engaged in tepid balancing that fails to prevent legislative self-dealing.<sup>122</sup> Justice Breyer may be the only Justice fully on board with the anti-competition approach.

Moreover, even *within* the Court’s campaign finance jurisprudence, the Court has not embraced the anti-competition approach to judging the constitutionality of campaign finance laws. *Shrink Missouri* certainly was not focused on promoting political competition, nor was *McConnell v. FEC*. Indeed, both Justice Scalia and Justice Kennedy argued in their dissents that BCRA is an “incumbent protection” scheme.<sup>123</sup> The majority’s response to

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<sup>118</sup> *LULAC*, 126 S. Ct. at 2652 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>119</sup> *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369–70 (1997).

<sup>120</sup> See Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331.

<sup>121</sup> See, e.g., *Clingman v. Beaver*, 125 S. Ct. 2029, 2044 (2005) (O’Connor, J., concurring) (“Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit.”); see also *id.* at 2045 (“[H]eightedened scrutiny helps to ensure that such limitations are truly justified and that the State’s asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.”).

<sup>122</sup> Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 884–88.

<sup>123</sup> *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 248 (2003) (Scalia, J., concurring in part and dissenting in part) (“We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice . . . .”); *id.* at 306 (Kennedy, J., concurring in part and dissenting in part) (arguing that in sum the soft money provisions of BCRA “look very much like an incumbency protection plan”).

this argument was a characteristically tepid footnote apparently added late in the drafting process.<sup>124</sup>

Any concern that Congress might opportunistically pass campaign-finance regulation for self-serving ends is taken into account by the applicable level of scrutiny. Congress must show concrete evidence that a particular type of financial transaction is corrupting or gives rise to the appearance of corruption and that the chosen means of regulation are closely drawn to address that real or apparent corruption.<sup>125</sup>

The majority added: "At bottom, Justice Kennedy has long disagreed with the basic holding of *Buckley* and its progeny that less rigorous scrutiny—which shows a measure of deference to Congress in an area where it enjoys particular expertise—applies to assess limits on campaign contributions."<sup>126</sup> The Court made no effort to seriously consider how BCRA affected the competitiveness of elections in a manner parallel to the effort made in *Randall* with regard to Vermont's low contribution limits.

Even if one were to chalk up dismissal of the anti-competition paradigm in pre-*Randall* cases to the fact that they came before a shift in *Randall*, *Randall* itself does not support finding a paradigm shift toward anti-competition. First, we should not lose sight of the fact that the plurality's anti-competition test is embraced by only three Justices in a plurality opinion, and at least one (and perhaps two of the three) of the Justices provisionally joined pending a future frontal attack on *Buckley*. So there is no majority of the Court that has embraced the anti-competition test, even in *Randall*.

Second, the plurality did not even apply the anti-competition paradigm throughout the issues in *Randall*. In particular, when the *Randall* plurality considered the constitutionality of the candidate spending limits, its test was *not* whether such spending limits in fact promote political competition—the issue of political competition is not mentioned even once in Part II of the plurality opinion examining the constitutionality of candidate spending limits. The plurality instead considered only whether *Buckley*'s holding barring expenditure limits should be reexamined, concluding it should not. If political competition mattered more than individual First Amendment

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<sup>124</sup> See Hasen, *supra* note 5, at 61 n.144, for an explanation of why I conclude that this footnote was added late in the drafting process.

<sup>125</sup> *McConnell*, 540 U.S. at 185–86 n.72.

<sup>126</sup> *Id.*

rights,<sup>127</sup> the plurality should have considered the effects of candidate spending limits on political competition.<sup>128</sup>

It is not that the plurality did not know of the issue. Justice Stevens, in his dissent, noted that the city of Albuquerque, New Mexico had candidate expenditure limits in place from 1974–2001 (except for a two year period), until the courts struck down the limits as inconsistent with *Buckley*. Justice Stevens wrote:

In its findings of fact [in the case challenging the Albuquerque candidate spending limits], the Federal District Court determined that “[n]ationwide, eighty-eight percent (88%) of incumbent Mayors successfully sought reelection in 1999. In contrast, since 1974, the City has had a zero percent (0%) success rate for Mayors seeking reelection.” The court further concluded that the “system of unlimited spending has deleterious effects on the competitiveness of elections because it gives incumbent candidates an electoral advantage.” While far from conclusive, this example cuts against the view that there is a slam-dunk correlation between expenditure limits and incumbent advantage. See also Brief for Center for Democracy and Election Management at American University as *Amicus Curiae* (concluding that Canada, the United Kingdom, New Zealand, and Malta—all of which have campaign expenditure limits—have more electoral competition than the United States, Jamaica, Ireland, and Australia—all of which lack such limits).<sup>129</sup>

The *Randall* plurality’s adoption of a new anti-competition test therefore cannot be explained by a broad shift in the Court toward accepting structural arguments in election law cases, and it cannot be explained by a smaller, similar shift in just its campaign finance cases. What then does explain it? It appears that it was much a matter of happenstance, part of Justice Breyer’s

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<sup>127</sup> Cf. Pildes, *supra* note 106 (“None of the harms noted [by the *Randall* plurality] involve individual First Amendment rights in any conventional sense.”).

<sup>128</sup> For example, Alan Gerber contends that if—as Gerber argues—additional incumbent spending increases the chances of incumbent victory, “spending caps, even if set lower than some challengers’ campaign spending levels, can significantly increase the chances of challenger victory.” Alan Gerber, *Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Variables*, 92 AM. POL. SCI. REV. 401, 410 (1998). There is a vigorous academic debate, summarized at the beginning of Gerber, over whether, as Gary Jacobson has posited, *challenger* spending matters much more than incumbent spending for electoral competition. *Id.* at 401–02. If Jacobson is correct, then spending limits could decrease, rather than increase, the chances of challenger victory.

<sup>129</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2510 n.4 (2006) (Stevens, J., dissenting) (citations omitted).

rear-guard action to save whatever he could of the Court's earlier jurisprudence upholding campaign finance regulation.

Justice Breyer appeared genuinely concerned at the *Randall* oral argument that the limits in Vermont were too low, despite his general belief in deference to legislative expertise.<sup>130</sup> Justice Breyer easily could have written an opinion for himself alone preserving much of *Shrink Missouri*, but distinguishing the Vermont limits as simply too low. That opinion would have reaffirmed the need for judicial deference to legislative decisionmaking in most cases and the interests "on both sides" of the constitutional equation. But he likely faced a post-argument conference with five other Justices who agreed the Vermont limits were unconstitutional, and some of whom were on record as wanting to dismantle the New Deference cases and move to deregulation of campaign financing. A "participatory self-government" opinion of Justice Breyer stood little chance of attracting the votes of two new Justices with generally conservative reputations.<sup>131</sup> Chief Justice Roberts' questioning of Vermont's attorney general showed a great deal of skepticism about the corruption rationale for Vermont's limits,<sup>132</sup> and Justice Breyer may have worried he would join the Justice Thomas opinion. Justice Alito, too, presented such a danger.

Justice Breyer therefore likely drafted his plurality opinion in an effort to forestall the creation of a five-Justice majority opinion dismantling *Buckley*'s holding on contribution limits. Chief Justice Roberts, who had promised during the confirmation process to move slowly and with humility in deciding Supreme Court cases,<sup>133</sup> likely had no appetite for such a broad holding unless absolutely necessary. Thus, the Chief was able to vote

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<sup>130</sup> Transcript of Oral Argument at 31, *Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (No. 04-1528), [http://www.supremecourt.us/oral\\_arguments/argument\\_transcripts/04-1528.pdf](http://www.supremecourt.us/oral_arguments/argument_transcripts/04-1528.pdf) (question from Justice Breyer to Vermont Attorney General) ("That is, the question is, what we're interested in is—at least what I've written that I'm interested in, is at what point do these become so low that they really, as a significant matter, shut off the possibility of a challenge. And from that point of view, your numbers, which do not tell me the expenditures in a competitive district, and your numbers, which do not explain all the problems that Judge Winter had with these things, do not help.").

<sup>131</sup> See Hasen, *supra* note 7, at 671–72, 677–78 (predicting that Chief Justice Roberts and Justice Alito will vote in a more conservative direction in election law cases).

<sup>132</sup> Transcript of Oral Argument at 26–28, *Randall*, 126 S. Ct. 2479 (No. 04-1528).

<sup>133</sup> See Sheryl Gay Stolberg & Adam Liptak, *Light Moments Amid Sharp Exchanges*, N.Y. TIMES, Sept. 14, 2005, at A1; see also Hasen, *supra* note 7, at 677–78 (noting that the question regarding the two new Justices and campaign financing is whether they "will stick with the status quo, perhaps in the name of judicial modesty and stare decisis, or move more aggressively toward the Justice Thomas deregulation model for campaign financing") (footnote omitted).

sincerely for a result (strike down the Vermont limits) while, at least for now, applying the existing precedent of *Buckley* in the name of stare decisis, and leaving open additional consideration in a future case. Justice Alito signaled that point, and there was no need for the Chief Justice to “pile on” by signing Justice Alito’s separate opinion.<sup>134</sup>

The anti-competition paradigm of the *Randall* plurality emerges in the desire to both (1) strike down the Vermont limits and (2) do so in a way that follows (or appears to follow) the *Buckley* precedent. Justice Breyer built the paradigm relying solely on this single sentence in *Buckley* explaining generally how contribution limits may infringe upon First Amendment rights: “Given the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.”<sup>135</sup> Justice Breyer was able to use this sentence to defend the result in the Vermont case as consistent with *Buckley* and respect for stare decisis, thereby avoiding the possibility that Justice Thomas’s deregulationist opinion could have become a majority opinion for the Court.

Although Justice Breyer in *Randall* was able to use this sentence from *Buckley* to construct his anti-competition test, the sentence read in context does not suggest the strong anti-competition reading Justice Breyer gives it. Immediately after the “amassing the resources” sentence, the *Buckley* Court added:

There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. The overall effect of the Act’s contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.<sup>136</sup>

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<sup>134</sup> See Foley, *supra* note 94 (“[W]hen examining the final draft of Breyer’s opinion, as it stood ready for public release, Chief Justice Roberts may have asked himself: ‘Is there anything in here that I absolutely need to disavow today in order to keep my options open in the future, including the option of joining with other members of the Court to overrule *Buckley* on the issue of contribution limits?’ ‘No’ is the answer that the Chief Justice honestly could have given himself to this question, and that fact alone provides sufficient basis for being cautious about the implications of his joining Breyer’s opinion without submitting a separate statement of his own.”).

<sup>135</sup> *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

<sup>136</sup> *Id.* at 21–22 (footnote omitted).

Footnote 23, in the middle of this quoted material, reads:

Statistical findings agreed to by the parties reveal that approximately 5.1% of the \$73,483,613 raised by the 1,161 candidates for Congress in 1974 was obtained in amounts in excess of \$1,000. In 1974, two major-party senatorial candidates, Ramsey Clark and Senator Charles Mathias, Jr., operated large-scale campaigns on contributions raised under a voluntarily imposed \$100 contribution limitation.<sup>137</sup>

Recall that *Buckley*, too, rejected a challenge to the *amount* of the FECA limits, proclaiming “no scalpel” to separate a \$1,000 limit from a \$2,000 limit.<sup>138</sup>

Remember as well that the majority in *Shrink Missouri* applied the “amassing the resources” language in *Buckley* to create a much more deferential test for judging low contribution limits, one that Justice Souter rightfully described in his *Randall* dissent as an extremely deferential “political audibility” test. This proves not only that *Buckley* does not mandate the anti-competition paradigm, but that it can be read in multiple, contradictory ways. Thus, *Randall* does little to add to the coherence of campaign finance law or election law in general. It just adds to the incoherence.

#### IV. *RANDALL*’S INTERNAL INCOHERENCE AND THE FALSE ALLURE OF TECHNOCRATIC ANSWERS

The last Part aimed to show that *Randall*’s focus on competition fits coherently into neither the Supreme Court’s larger election law jurisprudence nor its campaign finance jurisprudence. This Part turns from external coherence to the *internal* coherence of the competition test for low contribution limits, finding the test less predictable and coherent than its technocratic nature suggests.

Though the *Randall* plurality’s anti-competition test for judging the constitutionality of low campaign contribution limits is considerably less deferential than earlier tests suggested by Justice Breyer,<sup>139</sup> it still has the technocratic feel of a Justice Breyer opinion, setting out a multi-part test relying upon empirical evidence from experts to assist the courts in the exercise of independent judicial judgment.

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<sup>137</sup> *Id.* at 21 n.23.

<sup>138</sup> *Id.* at 30.

<sup>139</sup> See *supra* notes 45–49 and accompanying text.

The plurality imposes a two-part test, first requiring a court judging the constitutionality of a low campaign contribution limit to look for “danger signs” that the risks to political competition from the low limit are too great and then to address the tailoring of the law through an “assess[ment of] the proportionality of the restrictions.”<sup>140</sup>

The plurality’s test has a superficial aura of scientific exactness to it.<sup>141</sup> It makes the empirical assumption that “contribution limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.”<sup>142</sup> It then envisions expert testimony from social scientists on the question whether the particular limits that a legislative body has put in place will in fact harm political competition.

The plurality’s opinion furthers the aura of technocratic decisionmaking by giving these experts pointers for good scientific methods in testing the effect of the limits on competition. For example, the plurality praises the petitioners’ expert witness in *Randall* for looking at how contribution limits would have affected *the most competitive races* and criticizes the respondent expert’s examination of how contribution limits affected the *average races*.<sup>143</sup> The plurality explained:

[T]he critical question concerns not simply the *average* effect of contribution limits on fundraising but, more importantly, the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*. And information about *average* races, rather than *competitive* races, is only distantly related to that question, because competitive races are likely to be far more expensive than the average race.<sup>144</sup>

But both the plurality’s initial assumption—that low contribution limits harm challengers—and its faith in expert testimony are flawed. As to the initial assumption, the evidence has not been established that low contribution limits harm challengers. As Professor Persily recently noted,

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<sup>140</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006) (plurality opinion).

<sup>141</sup> But it is not even clear that its two-part test really has two parts. See Briffault, *supra* note 8, at 831.

<sup>142</sup> *Randall*, 126 S. Ct. at 2492 (plurality opinion). Justice Breyer made this same assumption in his earlier *Shrink Missouri* concurrence: “But we should not defer in respect to whether its solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge.” *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 404 (2000) (Breyer, J., concurring).

<sup>143</sup> *Randall*, 126 S. Ct. at 2495–96 (plurality opinion).

<sup>144</sup> *Id.* at 2496 (plurality opinion) (original emphasis).

Despite the emphatic pronouncements of the justices in these cases, those who study the relationship between campaign finance reforms and levels of electoral competition have not arrived at any firm conclusions as to the reforms' effects. Although the Court has assumed what seems to be an intuitive pro-incumbent bias of campaign contribution limits, the actual support for that relationship is mixed, at best, with most studies finding no effect and some concluding that limits enhance competition.<sup>145</sup>

Professors Primo, Milyo, and Groseclose—at least two of whom have written skeptically of campaign finance regulation in the past<sup>146</sup>—agree with Professor Persily that “we know surprisingly little about the impact of campaign finance laws on electoral outcomes.”<sup>147</sup> Yet their recent study of competitiveness in gubernatorial elections concludes that “contribution limits on individuals benefit electoral competition.”<sup>148</sup> “[I]ndividual contribution limits have a large, statistically significant, and negative effect on the size of the winning vote margin, implying an increase in competitiveness.”<sup>149</sup> Indeed, focusing on the most competitive races *pace* the *Randall* plurality, Primo, Milyo, and Groseclose's results “suggest that campaign finance laws do not affect close races more than lop-sided races, and in fact the reverse may be true.”<sup>150</sup>

This finding is in line with two other recent studies that have found that contribution limits can help challengers, thereby promoting political competition.<sup>151</sup> In addition, Professor Jacobson recently noted that BCRA's

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<sup>145</sup> Nathaniel Persily, *The Place of Competition in American Election Law*, in *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* 171, 187–88 (Michael P. McDonald & John Samples eds., 2006); *see also* Nolan L. Reichl, *What We Know and What We Don't: A Review of the Literature Empirically Analyzing the Effects of State Campaign Finance Reform Laws*, 8–21 (Apr. 21, 2006) (unpublished J.D. senior thesis, Stanford Law School), *available at* <http://ssrn.com/abstract=924434>.

<sup>146</sup> *See, e.g.*, David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 *ELECTION L.J.* 23 (2006).

<sup>147</sup> David M. Primo, Jeffrey Milyo & Tim Groseclose, *State Campaign Finance Reform, Competitiveness, and Party Advantage in Gubernatorial Elections*, in *THE MARKETPLACE OF DEMOCRACY*, *supra* note 145, at 268–69.

<sup>148</sup> *Id.* at 280.

<sup>149</sup> *Id.* at 278.

<sup>150</sup> *Id.*; *see also id.* at 280 (“[C]ontribution limits on individuals benefit electoral competition, and . . . this effect is not driven by an impact on close races.”).

<sup>151</sup> Kihong Eom & Donald A. Gross, *Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates*, 59 *POL. RES. Q.* 99 (2006); Thomas Stratmann & Francisco J. Aparicio-Castillo, *Competition Policy for Elections: Do Campaign Contribution Limits Matter?*, 127 *PUB. CHOICE* 177 (2006). For an earlier study finding no direct effects of campaign contribution limits—but finding that



doubling of the federal individual campaign contribution limits (from \$1,000 to \$2,000) did not increase the competition of House races in the 2004 elections.<sup>152</sup>

The causal mechanism of how contribution limits could help challengers is unclear. Professors Primo, Milyo, and Groseclose posit that contribution “[l]imits on individuals may . . . decrease winning margins, since incumbents are more likely to be successful at fundraising in general (since, after all, incumbents have already succeeded in the previous election).”<sup>153</sup> The theory appears to be that contribution limits lower the differential between the (higher) amount that incumbents can raise and the amount that challengers can raise, and that this relative parity in fundraising assists political competition.

It is too early to conclude from these studies that contribution limits necessarily *promote* political competition. Two of these studies involved gubernatorial races, and the issues might be different for legislative races. Contrary studies may appear in the future as well. And Professors Primo, Milyo, and Groseclose note that “very low limits like those in Vermont . . . merit caution.”<sup>154</sup> Thus, there may be different effects of contribution limits

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spending limits harm political competition—see Donald A. Gross, Robert K. Goidel, & Todd G. Shields, *State Campaign Finance Regulations and Electoral Competition*, 30 AM. POL. RES. 143 (2002). Limits on political party contributions may have a greater negative effect on the competitiveness of races. See Thad Kousser & Ray LaRaja, *The Effect of Campaign Finance Laws on Electoral Competition: Evidence from the States*, 426 POL’Y ANALYSIS 1 (2002). This is a question that merits much further study.

<sup>152</sup> Gary C. Jacobson, *The First Congressional Elections After BCRA*, in THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 185, 185 (Michael J. Malbin ed., 2006).

<sup>153</sup> Primo, Milyo, & Groseclose, *supra* note 147, at 273. The authors further expected contribution limits to advantage “Democrats, who in general do not have as deep a donor pool as Republicans.” *Id.* But the authors’ empirical study determined that such limits do not benefit either political party. *Id.* at 280. The authors also posited that limits on contributions by organizations (such as corporations) could improve competitiveness, “since organizations are more likely to contribute to an incumbent than a challenger.” *Id.* at 273. But the authors concluded from their empirical study that “merely having organizational contribution limits in place has no impact on competitiveness.” *Id.* at 277. Professors Eom and Gross offer some additional reasons to believe that contribution limits can help challengers: (1) some contributors wishing to influence a narrow area of policy might be more inclined to contribute to both candidates in the presence of contribution limits to assure access to the winner; (2) contribution limits might “reduce incumbent spending while not affecting the level of challenger spending”; or (3) contribution limits might reduce incumbent spending more than they reduce challenger spending. Eom & Gross, *supra* note 151, at 106. This is certainly an area for additional research.

<sup>154</sup> Primo, Milyo, & Groseclose, *supra* note 147, at 280–81.

in different amounts—and the difference will matter state by state. A \$400 limit in Vermont is not the same as a \$400 limit in New York.<sup>155</sup> But the point to be gleaned from the social science literature is that the *Randall* plurality is wrong if it assumes that “contribution limits hurt challengers” is the accepted conventional wisdom among political scientists. If anything, the issue is subject to intense debate.

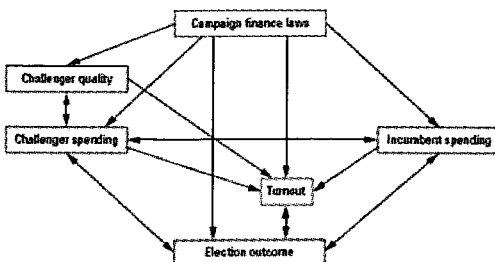
It is not that surprising that the conventional wisdom may be wrong, or is at least difficult to test. There is an “endogeneity” problem with figuring out how campaign finance rules affect the competitiveness of races: “spending both influences and is influenced by the competitiveness of a race.”<sup>156</sup> Professor Gerber notes some reasons why spending levels are influenced by electoral conditions: “(1) As the probability of victory rises, it is easier for a candidate to raise money; (2) if the election looks close, supporters are more likely to contribute to the candidates; and (3) if the incumbent becomes sure of victory, the incumbent scales back fundraising activity.”<sup>157</sup>

This endogeneity problem in figuring out how contribution limits affect electoral competition is compounded by the phenomenon of *adaptation*, which makes any expert testimony on how particular contribution limits are likely to affect political competition in a particular jurisdiction sketchy at best. The adaptation phenomenon is a corollary of the “hydraulic effect” of campaign financing: “Money, like water, will always find an outlet.”<sup>158</sup> Under the adaptation phenomenon, if a jurisdiction imposes new, lower contribution limits, donations will continue to flock to competitive races as

<sup>155</sup> *Id.* at 276 (“Put concretely, does a \$1,000 limit on individual contributions to a candidate mean the same thing in Arkansas as it does in California?”).

<sup>156</sup> *Id.* at 272. The authors represent the endogeneity problem in this graphic, reprinted with permission:

Figure 12-1. The Complex Web of Campaign Finance Laws and Election Outcomes



<sup>157</sup> Gerber, *supra* note 128, at 402.

<sup>158</sup> *McConnell v. FEC*, 540 U.S. 93, 224 (2003); see also Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

the parties and candidates target additional donors to make smaller donations allowed under the new limits.

A major problem with analyses such as the one offered by plaintiffs' expert in *Randall* is that it assumes a *static* pool of donors and ignores the adaptation phenomenon. Thus, the *Randall* plurality supports its argument<sup>159</sup> by noting the petitioners' expert testimony that "concluded that Act 64's contribution limits would have reduced the funds available in 1998 to Republican challengers in competitive races in amounts ranging from 18% to 53% of their total campaign income."<sup>160</sup> This assumes that the same pool of donors—and no one else—would have donated to the candidate up to the amount of the limits. It is more plausible to believe that additional donors would have been found to make sure those races stay competitive if run under the new limits.

I have confidence for two reasons that lower contribution limits would not necessarily inhibit the ability of candidates to run a competitive campaign. First, smaller donors are already the backbone of competitive federal campaigns. The bulk of donors on the federal level give in amounts far lower than the federal limits. As Professors Ansolabehere, de Figueiredo, and Snyder found, "[w]hen increased demand for campaign funds induces candidates to raise additional funds, they turn not to political action committees or even large individual donors, but to small individual donors, who give an average of about \$100."<sup>161</sup>

Second, the experience with BCRA shows that the small donor phenomenon has been bolstered by the rise of Internet-based fundraising. In the last few elections, the Internet has become a powerful tool to get out the message to small donors that they should make small donations to competitive races.<sup>162</sup> During the 2004 presidential election in the period before public financing kicked in, George Bush raised \$78 million in campaign contributions from those giving less than \$200 each (up from \$10

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<sup>159</sup> The plurality hedges, noting that "the record suggests, though it does not conclusively prove, that Act 64's contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns." *Randall v. Sorrell*, 126 S. Ct. 2479, 2495 (2006).

<sup>160</sup> *Id.*

<sup>161</sup> Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder Jr., *Why is There So Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 124–25 (2003).

<sup>162</sup> Kelly D. Patterson, *Spending in the 2004 Election*, in FINANCING THE 2004 ELECTION 68, 80 (David B. Magleby, Anthony Corrado & Kelly D. Patterson eds., 2006) ("A major development in 2004 was the use of the Internet in fundraising by candidates, parties, and interest groups.").

million in that category in 2000)<sup>163</sup> and John Kerry raised “\$79 million in donations of less than \$200.”<sup>164</sup> These are astounding numbers, though part of the overall increase is due to the *raising* of the individual contribution limit to federal candidates from \$1,000 to \$2,000 per election.

The adaptation phenomenon is by now well established. Before BCRA, many were predicting that BCRA would decimate the political parties, which depended on six- and seven-figure “soft money” donations from labor unions, corporations, and wealthy individuals.<sup>165</sup> After BCRA, unions and corporations could no longer make donations to the parties from their corporate treasuries, and individual contributions to parties were greatly limited to “hard money” amounts (at higher rates than under prior law); yet the two national parties raised more in money from individuals under the “hard money” limits in 2004 than they raised in hard and soft money combined in the 2000 election.<sup>166</sup> In addition, in 2004 the Democratic National Committee raised \$166 million from contributors giving less than \$200 each (up from \$60 million in 2000) and the Republican National Committee raised \$157 million from these donors (up from \$91 million in 2000). In short, competition, especially today, can thrive even under lower contribution limits.

Expert testimony on how contribution limits would affect competition must do even more than predict the kind of adaptation that would take place under the new rules; it must also consider how the new limits would affect competition in the broader context of other campaign finance and election law rules. For example, Vermont’s Act 64 includes generous voluntary public financing, which gave participating incumbents only 85% or 90% (depending on the office) of the amount available to participating challengers.<sup>167</sup> The availability of that public financing—with an edge given to challengers—might make races more competitive.<sup>168</sup> In addition, experts would have to consider other factors such as term limits and redistricting (in

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<sup>163</sup> John C. Green, *Financing the 2004 Presidential Nomination Campaigns*, in FINANCING THE 2004 ELECTION, *supra* note 162, at 93, 104.

<sup>164</sup> *Id.* at 105.

<sup>165</sup> Robin Kolodny & Diana Dwyre, *A New Rule Book: Party Money after BCRA*, in FINANCING THE 2004 ELECTION, *supra* note 162, at 183.

<sup>166</sup> *Id.* at 183–84.

<sup>167</sup> See VT. STAT. ANN. tit. 17, § 2805a(c) (2005).

<sup>168</sup> The literature on this question is muddled as well. See Reichl, *supra* note 145, at 24–38. Professors Primo, Milyo, and Groseclose found no statistically significant effect of public financing on the competitiveness of gubernatorial races. Primo, Milyo, & Groseclose, *supra* note 147, at 278.

legislative races), in making a judgment as to how low contribution limits would affect the outcome of contested races.<sup>169</sup>

In the end, cases challenging the constitutionality of low contribution limits will devolve into a “battle of the experts” over how such limits would affect political competition. But such testimony often will be speculative when it comes to whether enough money may be raised (by the candidates or others) to ensure a competitive race. Court decisions could well turn upon a thin credibility determination to be made by the court, a determination that may depend not so much upon an evaluation of social science but upon each judge’s predisposition to favor or oppose the particular campaign finance regulation.<sup>170</sup>

There is some evidence that the *Randall* plurality itself fell victim to this predisposition. Though the plurality chastised Vermont’s expert for relying on *average* races in looking at effects on political competition, that’s not all he did. For example, the expert, Professor Gierzynski, provided the following relevant information:

The case of Deb Markowitz [candidate for Vermont secretary of state] clearly demonstrated that it is possible to run an effective campaign raising money in mostly small amounts. Only 3.1% of her contributions exceeded the new \$400 limit. \$7,500 of her revenue, or 14.3% of her total revenue, was from amounts over the limit (it would take a mere 19 contributions at the \$400 limit to replace the amount). And without any previous electoral experience she unseated an incumbent candidate in a close race.<sup>171</sup>

The *Randall* plurality also rejected contrary evidence from the Burlington, Vermont mayoral race, finding “the facts of that particular election are not described in sufficient detail to offer a convincing refutation of the implication arising from the petitioners’ experts’ studies.”<sup>172</sup> The district court gave the following description of that race:

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<sup>169</sup> Cf. Jacobson, *supra* note 152, at 202 (“Whether BCRA can actually make elections more competitive, at least at the House level, is more doubtful because competition depends so heavily on the partisan makeup of constituencies and the strategic decisions of candidates and contributors, variables totally beyond BCRA’s influence.”).

<sup>170</sup> See Briffault, *supra* note 8, at 831 (“A competitiveness standard . . . increases the judicial role, requires a close engagement with the record, and is open to conflicting readings of the same evidence.”).

<sup>171</sup> Expert Report of Anthony Gierzynski, Joint Appendix 50, *Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (Nos. 04-1528, 04-1530, and 04-1697).

<sup>172</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2496 (2006) (plurality opinion).

Example: The March 1999 Burlington Mayoral election. Contribution limits of \$200 were in effect for the March 1999 Burlington Mayoral race. The two principal candidates for mayor in 1999 were Peter Clavelle and Kurt Wright. Both were able to amass sufficient resources to run effective campaigns. Clavelle raised almost \$39,000, more than he raised in three of his four previous campaigns for mayor. He raised more than \$24,000 from 794 contributors of \$100 or less. Only 55 contributors gave him the maximum contribution of \$200. Wright raised \$19,000. Although he received 44 contributions of \$200, this was only 13% of all his contributors. He received 290 contributions, amounting to over half of his funds, from contributors of \$100 or less. By his own statements, Wright ran an effective campaign in a competitive race against incumbent Clavelle.<sup>173</sup>

I am not suggesting that these two anecdotes *prove* that Vermont's new lower contribution limits would have promoted political competition. But there is going to be enough flexibility in the *Randall* plurality's test that judges hearing from competing experts will (albeit subconsciously) hear what they want to hear about how particular campaign contribution limits are likely to affect the competitiveness of close elections. The *Randall* plurality's test fails to achieve internal consistency and coherence.

#### V. ACHIEVING COHERENCE THROUGH TRANSPARENCY AND CAREFUL BALANCING

Parts III and IV set forth the view that the new campaign finance jurisprudence of *Randall* is as incoherent as its predecessor jurisprudence. What should be put in its place? For those who have read my earlier work, the answer will be unsurprising: the Court should judge the constitutionality of low campaign contribution limits and other campaign finance laws through careful balancing. In particular, courts should engage in a careful and honest balancing that gives considerable deference to the value judgments made by states in enacting campaign finance laws, but then use close scrutiny to make sure the measure is carefully drawn to meet those goals. If the measure is not closely drawn, the court should strike it down as unconstitutional. If it is closely drawn, the court must then consider whether the measure is nonetheless unconstitutional because of the speech and association costs it imposes.<sup>174</sup>

This kind of honest balancing was impossible in *Randall* because of the Court's existing campaign finance jurisprudence. Vermont was forced to

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<sup>173</sup> Landell v. Sorrell, 118 F. Supp. 2d 459, 471 (D. Vt. 2000).

<sup>174</sup> This is the approach I developed in *HASEN*, *supra* note 11, and applied to the Supreme Court's decision in the *McConnell* case in *Hasen*, *supra* note 5.

defend its law on grounds that it was necessary to prevent corruption or the appearance of corruption, but it had no real evidence to offer in order to prove that such low contribution limits really were necessary to prevent corruption or its appearance. Chief Justice Roberts' questioning at oral argument made that point painfully clear.<sup>175</sup> Certainly some contribution limits are justified to prevent corruption (perhaps even limits as low as the ones at issue in *Shrink Missouri*), but it would be very difficult to make the anti-competition case for the strict Vermont limits.

It seems quite obvious that the real goal of the Vermont measure, hidden from debate in order to comply with *Buckley's* rejection of the equality rationale, was the promotion of political equality. The Justices ignored the political equality argument, despite an impassioned and eloquent opinion from Judge Calabresi to bring this issue into the open (in the way that Justice Breyer tried to do in his *Shrink Missouri* concurrence):

The notion that intensity of desire is not well-measured by money in a society where money is not equally distributed has been, since *Buckley*, the huge elephant—and donkey—in the living room in all discussions of campaign finance reform. *Buckley*, by fiat, declared the state's explicit recognition and amelioration of wealth distribution problems in the electoral marketplace to be an insufficiently compelling interest to pass constitutional muster. And yet, I submit, it remains at least implicitly behind much campaign finance reform legislation.<sup>176</sup>

Thus, the real question the *Randall* Court should have asked is whether the Vermont law was closely drawn to promote political equality (an interest that the Vermont legislature was permitted to, but need not necessarily, adopt) and, if so, whether the costs to individuals and groups who wanted to mobilize for political action were too great to allow the law to go forward despite its gains in promoting political equality.<sup>177</sup>

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<sup>175</sup> See Transcript of Oral Argument at 26–28, *Randall v. Sorrell*, 126 S. Ct. 2479 (No. 04-1528).

<sup>176</sup> *Landell v. Sorrell*, 406 F.3d 159, 162 (2d. Cir. 2005) (citations omitted) (Calabresi, J., concurring in the denial of rehearing en banc).

<sup>177</sup> This test is not only different from the *Randall* plurality's test, it is also a much more skeptical test than Justice Souter's New Deference test which asks if a campaign contribution is so low as to be "laughable" or if the limits would depress candidates' voices "to the level of political inaudibility." *Randall*, 126 S. Ct. at 2514, 2516 (Souter, J., dissenting).

Social science evidence on the law's effects could have helped in answering both questions.<sup>178</sup> First, on the question whether the law would promote political equality, social scientists could consider what channels of election-related communication the law would be expected to equalize. On the one hand, a law that makes it much more difficult (than under former law) for some groups or individuals to express candidate support through the jurisdiction's usual means of political communication would be hard to justify on political equality grounds. On the other hand, a law that subsidizes election-related communications (through public financing, for example) or that provides structured election-related debates could more easily be seen as promoting political equality.

If it is plausible to believe from the social science evidence that the challenged law promotes some version of political equality, the court should next consider the costs of such laws to individuals or groups. A law, for example, that forbids *all* election-related advertising might be said in some perverse way to promote a kind of political equality (though not of the "participatory self-government" variety promoted by Justice Breyer), but the costs of such a system to the rights of individuals and groups to organize for political action would be simply too high to justify such a law. In general, the task of social scientists in this second stage is to examine the change in campaign finance laws *as a whole* and, considering the hydraulic effect of campaign money and the adaptation phenomenon, ask whether significant election-related activity is likely to be curtailed by the new law. Social scientists can point out the likely costs of such a system and then judges can make an independent judgment in balancing the state's interests against potential costs.

Significantly, the kinds of political science questions that courts would need to examine under my proposed test are more likely to lead to determinate results than the anti-competition test of the *Randall* plurality. That is, my proposed test has political scientists asking easier-to-answer questions: Will the law open or close doors of election-related communication? Considering the expense of election-related communications in the jurisdiction, is vibrant political debate likely to occur under the new system? How does the new system compare to the old system in terms of the expected vibrancy of political debate? Unlike the *Randall* test, my proposed test does not require courts to determine whether challengers would be able to raise enough money to potentially win closely

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<sup>178</sup> See Hasen, *supra* note 122, at 880 (arguing for a focus on the *effect* of election law legislation on the rights of individuals and groups rather than a focus on the *intent* of the legislative body in passing the legislation).



contested races, a question that is probably unanswerable in most circumstances.

Without evidence from a trial conducted on the proper questions, I cannot answer definitively how I would have liked the Court to decide a constitutional challenge to Vermont's contribution limits under my proposed standards. But there are reasons to be concerned about the constitutionality of Vermont's law under the second part of my test. The Vermont law, as the plurality noted, made it very difficult for volunteers even to provide enough coffee and donuts to organize for political action,<sup>179</sup> or for political parties to collect and pool very small donations from groups of individuals to support candidates backed by the party.<sup>180</sup> From these facts, I have serious concerns the Vermont law would have prevented a "vibrancy and diversity of election-related speech,"<sup>181</sup> even assuming it would have promoted some version of political equality in Vermont, especially if lower limits would have increased the pool of small donors and therefore "democratized" the donor pool to some extent.<sup>182</sup>

Even if we had all the evidence necessary to make a judgment under my proposed test, I doubt that the Justices on the Court would reach consensus under my proposed test on how the balance should be struck. One can imagine that if Justices Thomas and Souter both agreed to apply the test, they would strike the balance differently. If that's the case, there is a danger that my approach produces no more of a coherent or predictable means of judging the constitutionality of campaign finance laws than the current and earlier approaches that I have criticized.

But coherence emerges through transparency. Courts appear to already be engaged in a *sub silentio* balancing of rights and interests, in a convoluted and hidden way, because of the legacy of *Buckley*. By having judges engage in balancing openly and forthrightly, we will be better able to examine and

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<sup>179</sup> *Randall*, 126 S. Ct. at 2498 (plurality opinion).

<sup>180</sup> *Id.* at 2497 ("[I]magine that 6,000 Vermont citizens want to give \$1 to the State Democratic Party because, though unfamiliar with the details of the individual races, they would like to make a small financial contribution to the goal of electing a Democratic state legislature . . . [The Act] permits the party to give no more than \$200 to each candidate, thereby thwarting the aims of the 6,000 donors from making a meaningful contribution to state politics by giving a small amount of money to the party they support.").

<sup>181</sup> Hasen, *supra* note 5, at 71.

<sup>182</sup> Cf. Michael S. Kang, *The Hydraulics of Party Regulation*, 91 IOWA L. REV. 131, 160–72 (2005) (discussing how court-driven changes in party rules can shift balance of power within party coalition).

judge the value choices made by judges.<sup>183</sup> The giving of real reasons will impose some rationality on the system. We will then know how the court is weighing the competing values “on both sides” of the constitutional equation. That, in turn, should generate core principles that may be applied across other campaign finance, and election law, cases. The giving of clear reasons also may crystallize the issues for potential constitutional amendment in the face of Court rejection of reasonable campaign finance restrictions.

## VI. CONCLUSION

The *Randall* plurality instructs judges to use “independent judicial judgment”<sup>184</sup> in judging the constitutionality of campaign contribution laws. That instruction is correct. But the plurality strays off course in its anti-competition focus and faith in social science evidence on the question of how low limits affect political competition. Social science, and what it tells us about the effects of campaign finance law on competition, can help in an honest balancing process, but social science is no substitute for independent judicial judgment.

*Randall* may turn out to be a blip before a dramatic shift on the Court toward deregulation or, less likely, back toward the New Deference. But despite the swings in the past and the potential for future swings, the one consistent feature of the Court’s campaign finance jurisprudence has been incoherence. Unfortunately, *Randall* does nothing to improve the Court’s jurisprudence on that score. It is time for a change. Again.

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<sup>183</sup> Cf. Daniel R. Ortiz, *The Empirics of Campaign Finance*, 78 S. CAL. L. REV. 939, 945 (2005) (suggesting that Court doctrine may be secretly coherent even if “the Court feels unable, for whatever reason, to revise constitutional doctrine to better conform it to what constitutional principle requires”).

<sup>184</sup> *Randall*, 126 S. Ct. at 2492.